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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 623

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

HENRY E. DRUM, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM.

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STATEMENT.

Weather-Seal, Inc., intervening petitioner, files the following motion pursuant to Rule 16 and its brief in support of both its motion and in opposition to the request for review by the appellants.

MOTION.

Weather-Seal, Inc., pursuant to Rule 16, hereby moves that this Court enter an order affirming the order of the United States District Court for the Western District of Oklahoma entered in the within matter, or in the alternative, to dismiss the within appeal for the reasons that there are no substantial questions requiring further argument. The decision of the District Court properly states

the established law applicable to the issues presented and the questions presented in the jurisdictional statements by appellants are not the issues presented to and decided by the Interstate Commerce Commission, nor presented to or decided by the District Court.

QUESTION.

The instant proceeding, in the words of the Interstate Commerce Commission investigator who testified before the hearing before that Board (Record 93), stated, "* * * on account of some of the road inspections that we made had indicated that the owner was also driving his own equipment." In the same hearing, counsel for the Commission stipulated that the only issue before the Interstate Commerce Commission was one of control over the operations by the Oklahoma Furniture Manufacturing Company (Record 87-88).

The Commission, in their majority opinion (page 54 of the government's jurisdictional statement) stated,

> "Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for hire; but once the owner-operators enter into the comprehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part."

In his dissenting opinion, Commissioner Webb, in calling attention to this element in the case noted (page 58 of the government's jurisdictional statement):

> "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private

> carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary. * * *"

The District Court recognized that the issue of control was the prime question considered by the Interstate Commerce Commission and was therefore the principal question decided by that court. The court's statement, which appears at page 29 of the government's jurisdictional statement, summed up the issue as follows:

> "The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the *Church* case. * * *"

It is therefore clear, as was pointed out by Commissioner Webb in his dissenting opinion (page 59 of the government's jurisdictional statement), that if employee A drives equipment leased to the employer by employee B and if employee B drives the equipment leased to the employer by employee A, the Interstate Commerce Commission under its decision would consider the arrangement lawful and proper. The Commission would consider it illegal only when employee A drives employee A's truck, and when employee B drives employee B's truck—everything else being identical.

The question which is presented in this appeal can be stated as follows: Can a simple, unsophisticated truck driver, trying to earn more than a daily wage for his family, enter into a lease for his truck, upon the best terms available, and enter into a separate contract of employment to drive it or some other truck for the same employer, both of which agreements are individually lawful and proper and free of subterfuge?

All of the appellants' statements in their jurisdictional statement, based upon the financial result, are made for the sole purpose of covering up this real issue in the hope of making a simple issue so complicated that this Court will feel that there is a serious question of great import involved.

ARGUMENT.

Commissioner Webb, who unquestionably sat with the majority commissioners in their deliberations in this case, in his dissenting opinion, very clearly cut through the official language of the majority opinion and stated the real basis for the opinion when he wrote the following:

> "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation." (page 60, government's jurisdictional statement.)

There can be no other reason for the Commission to find as they did since they also found that (1) there was no attempt at subterfuge; (2) the lease agreements, standing by themselves were proper; and (3) the employment contracts, standing alone, were also proper. Nevertheless, they proceeded from these three premises to find that when a lessor-driver drives his own truck it is illegal.

Without pointing to all of the fallacies in the majority opinion, it should suffice to illustrate the point to urge the Court to turn to pages 50 and 51 of the government's jurisdictional statement, wherein the Interstate Commerce Commission discussed the responsibility for damage to cargo being transported on the leased equipment. There

was no question that under the lease agreement the Oklahoma Furniture Manufacturing Company was responsible for any loss or damage to the cargo transported by its employees. This responsibility for cargo loss is an important criteria in determining whether or not there is a genuine private carriage being conducted, since, obviously, any private carrier is responsible for its own merchandise which it is handling. In any investgation such as the Commission was carrying on it is proper that the Commission should seek out any devious means for shifting this responsibility onto the owner or driver of the equipment. In this case the Commission could find no skulduggery; but, rather than treat that as evidence that the arrangement was proper, it proceeded to twist this fact into an additional basis for holding that the arrangement was illegal by stating that "in this day when such responsibilities readily can be passed on to insurers, (it) is little more nor less than a rate adjustment." (page 50, government's jurisdictional statement.)

The Court will note in its examination of the Commission's full opinion that, as in the example relative to cargo insurance, every indicia of legality was twisted into something improper and the only fact upon which the Commission based its decision was that generally each employee drove the truck which he had leased to the company. The majority, in their zeal to solicit business for a common or contract carrier, overlooked the clear mandate of the Congress as declared in the Transportation Act of 1940, as reported in *Taylor vs. Interstate Commerce Commission*, 209 Fed. 2d 353:

> "The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a weasel word in

this connection. The policy of the Act declares as follows:

> 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each;* * * *' (Emphasis supplied.) Transportation Act of 1940, Par. 1, 54 Stat. 899, 49 U. S. C. A. note preceding section 301.

"One of the modes of transportation subject to the Act, as having 'inherent advantages' is that by private carriers of their own property. This is stated in 303(17) as follows:

> '(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in the furtherance of any commercial enterprise.'

"We think that in interpreting this paragraph and paragraph (15) providing for 'contract carriers' later considered, there is no rule of interpretation more liberal for one than the other."

See also *Brooks Transportation Company, et al. vs. United States,* 93 F. S. 517, Aff. 340 U. S. 925, 95 Law Ed. 668, and *Interstate Commerce Commission vs. Woodall Food Products Co., Inc.,* 112 F. S. 639, Aff. 207 Fed. 2d 517.

Examination of both the majority opinion of the Interstate Commerce Commission, the minority opinion by Commissioner Webb, and the opinion of the District Court conclusively discloses that every indicia of a lawful, legiti-

mate private carriage existed. The majority, in their desire to protect common and contract carriers, refused to give any weight to the evidence of legitimacy; but, on the contrary, drew unwarranted inferences therefrom.

There is no basis in law for this discrimination against private carriers. On the contrary, Congress has recognized them as carriers, has decreed that insofar as safety of operations is concerned they shall be regulated by the Interstate Commerce Commission, and they should therefore receive the equal protection and supervision accorded to common and contract carriers.

The great emphasis in the jurisdictional statements filed with this Court emphasizes that the Oklahoma Furniture Manufacturing Company has leased equipment at a fixed price and has hired drivers at a fixed mileage rate. The conclusion is drawn from this that no one should be permitted to fix their cost of transportation without employing a contract or common carrier. This is specious reasoning. On the one hand, the appellants refused to properly recognize those costs that were not fixed—responsibility for loss to cargo, vacation pay for the drivers, the costs and expenses of payroll deductions for the employees, Workmen's Compensation, the risks of increases caused by renegotiation of leases, the risks of increases in drivers' earnings due to negotiations with the union which bargains for them, the costs to the Oklahoma Furniture Manufacturing Company in owning its own trailers, the hidden cost of supervising the drivers and the equipment, the cost of loading the trailers, the cost of compliance with the Interstate Commerce Commission's safety regulations, which admittedly they complied with, the payment of public liability and property damage insurance, as well as many others. None of these items were in dispute. On the other hand, the Commission decided, and presumably the appel-

lants agree, that it is proper for a private carrier to lease motor freight equipment since they agree that the leases involved in this case were proper but for the fact that lessors drove the equipment. The majority and the appellants further agree that the employment of drivers on a mileage basis was proper since they agreed that the employment contract was lawful but for the fact that the drivers on occasion drove their own vehicles. Thus, without the need for citation of authority, it is clear that there is nothing abhorrent in a manufacturing company attempting to fix and control its costs.

It is therefore evident that the fixing of costs is not a real issue over which this Court should be called upon to decide.

It should also be noted that on page 7 of the government's statement the following appears: "* * * the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control." We are now in a situation where a case which commenced for the sole purpose of testing control has been moved around in the minds of the appellants so that control is no longer an issue.

Much ado was made in the government's brief relative to a study entitled, "Gray Area of Transportation Operations." From the references made to it in the appellants' brief it is clear that this is an unofficial, apparently biased study made by the Interstate Commerce Commission in an effort to influence legislative action by the Congress of the United States. This study was not presented in evidence, nor was it mentioned, let alone considered, by either the Commission or by the District Court. It is fairly obvious that Congress did not receive it favorably since no legislative action was taken by reason of it. Arguments based upon this study should not be considered.

This Court has regularly held that arguments not presented to or decided by the lower courts would not be considered by this Court. *Delgadillo vs. Carmichael*, 332 U. S. 388, 92 Law Ed. 17; *McGrath vs. Manufacturers Trust Co.*, 378 U. S. 241, 94 Law Ed. 31.

CONCLUSION.

It is therefore respectfully submitted that the decision of the District Court for the Western District of Oklahoma should be affirmed, or in the alternative, that the within appeal should be dismissed for the reasons that there is no substantial question involved requiring further argument, that the principal issues presented by the appellants in the jurisdictional statement were not presented to nor considered by the lower court or the Interstate Commerce Commission.

Respectfully submitted,

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